Washington Law Review

Volume 40 | Number 1

4-1-1965

Residence Is Alternative Jurisdictional Basis to Domicile in Serviceman's Divorce Action

anon

RESIDENCE IS ALTERNATIVE JURISDICTIONAL BASIS TO DOMICILE IN SERVICEMAN'S DIVORCE ACTION

Plaintiff, an Air Force officer stationed in Alaska, commenced action for divorce under the provisions of an Alaska statute[1] which extends divorce jurisdiction to military personnel who have resided within the state for one year. Defendant, a domiciliary of Pennsylvania, made a general appearance by attorney and contested the court's jurisdiction to grant the decree, alleging that plaintiff was not an Alaska domiciliary. The lower court dismissed plaintiff's complaint for lack of jurisdiction. On appeal, the Alaska Supreme Court reversed. *Held:* An Alaska court has jurisdiction to grant divorces to military personnel who have resided in the state for one year even though they may not be Alaska domiciliaries. *Lauterbach v. Lauterbach,* 293 P.2d 24 (Alaska, 1964).

The traditional view of American courts has been that domicile of one party to a divorce proceeding is prerequisite for jurisdiction to affect the status of marriage,[2] and that a person can have only one domicile for any one purpose.[3] This rule is based, in part, upon the view of many state courts that a divorce action, insofar as it affects status, is an *in rem* proceeding in which the *res,* the marital status, is located only at the domicile of either party.[4] The domicile requirement,

---

[1] ALASKA STAT. 09.55.160 (1962). "A person serving in a military branch of the United States government who has been continuously stationed in a military base or installation in the state for a period of one year *shall be deemed a resident in good faith* of the state for the purposes of § 70-230 of this chapter." (Emphasis added.) American courts almost invariably construe "residence" as used in statutes prescribing a court's jurisdiction to grant divorce decrees to mean "domicile." See Reese and Green, *That Elusive Word Residence,* 6 VAND. L. REV. 561 (1953). This rule of interpretation is noted in the RESTATEMENT (SECOND), CONFLICT OF LAWS § 9, comment *j* (Tent. Draft No. 2, 1954).

[2] "A state lacks judicial jurisdiction to dissolve a marriage when neither spouse is domiciled within the state." RESTATEMENT *op. cit. supra* note 1, § 111 (Tent. Draft No. 1 (1953); *but see,* § 111a; GOODRICH, CONFLICT OF LAWS § 127 (4th ed. 1964). When dealing with divorce, courts are concerned with "domicile of choice." See STUMBERG, CONFLICT OF LAWS 16-50 (3rd ed. 1963). A widely adopted definition is that of Mr. Justice Story: "That is properly the domicile of a man where he has his true, fixed permanent home, and principal establishment, and to which, whenever he is absent, he has the *intention* of returning." (Emphasis added.) STORY, CONFLICT OF LAWS § 41 (8th ed. 1883). Theoretically, all that is necessary to change one's domicile is a concurrence of physical presence and the requisite intent to make one's home at that place. RESTATEMENT, *op. cit. supra* note 1, § 15.

[3] LEFLAR, CONFLICT OF LAWS 15 and § 15 (1959); RESTATEMENT, *op. cit. supra* note 1, § 11; *but see* COOK, LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS, ch. VII and ch. XVII, at 446-47 (1942).

[4] See generally, EHRENZWEIG, CONFLICT OF LAWS § 76 (1962); Rheinstein, *The Constitutional Bases of Jurisdiction,* 22 U. CHI. L. REV. 775 (1955); Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes,* 9 VAND. L. REV. 1 (1955).

coupled with the *in rem* conception of divorce proceedings, has provided a method by which courts can render valid ex parte divorce decrees against defendants not otherwise within the courts' jurisdiction. Proponents of the domicile requirement contend that it serves to restrict divorce jurisdiction to the states which have the greatest interest in the parties' marital status,[5] and that it restrains attempts to circumvent the divorce policies of the domiciliary states. Functionally, domicile has provided a generally accepted standard which limits the jurisdiction a state may claim under the aegis of the full faith and credit clause, thereby accommodating the individual states' jurisdictional powers over divorce proceedings.[6]

Unfortunately, a literal application of the domicile requirement often denies military personnel access to divorce forums in states in which they are stationed. The general rule is that military personnel continue to be domiciled in the state of their domicile at the time of entry into military service.[7] This is partly a rule of practicality, but primarily it is a conclusion of law which follows from the emphasis placed upon subjective intent in the historic definition of domicile. Because military personnel are subject to orders and frequent relocation they are not free to exercise their "intentions" by choosing a permanent home. As a result, they cannot establish a new domicile in states in which they are stationed, and are usually unable to meet the jurisdictional requirements for commencing divorce proceedings in those states.[8] Alaska is not the first state to enact a divorce statute which eliminates the domicile requirement for the benefit of military personnel.[9] One state has

[5] Williams v. North Carolina, 317 U.S. 287, 298 (1942).

[6] Rheinstein, *supra* note 4, at 781; LEFLAR, *op. cit. supra* note 3, § 9.

[7] "A person cannot acquire a domicile of choice by any act done under a legal or physical compulsion." RESTATEMENT, *op. cit. supra* note 1, § 21. Comment *d* specifically applies this rule to military personnel.

[8] *E.g.*, Clark v. Clark, 71 Ariz. 194, 225 P.2d 486 (1950); Pendleton v. Pendleton, 109 Kan. 600, 201 Pac. 62 (1921). The latter case suggests the difficulty in establishing domicile that might be encountered by a serviceman whose family had been in the armed services for several generations. In many states a divergent line of cases find domicile, and allow maintenance of divorce proceedings by military personnel who live off base and can adduce objective proof of intent to attain domicile. See Annot. 21 A.L.R.2d 1163, §§ 7-11 (1952).

[9] FLA. STAT. ANN. § 46.12 (Supp. 1964) was upheld in Mills v. Mills, 153 Fla. 746, 15 So.2d 763 (1943). KAN. GEN. STAT. ANN. § 60-1502 (1949) was the first state legislation of this nature. It was upheld in Craig v. Craig, 143 Kan. 624, 56 P.2d 464 (1936). N.M. STAT. ANN. § 22-7-4 (1954) was upheld in Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954), and Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958). TEX. REV. STAT. ANN. art 4631 (1960) was upheld in Wood v. Wood, 159 Tex. 350, 320 S.W2d 807 (1959). ALA. CODE, tit. 7, § 96 (1) (1960) was upheld in Conrad v. Conrad, 275 ALA. 202, 153 So.2d 635 (1963). At least four other states have statutes similar to Alaska's which have not to date been questioned in the courts: KY. REV. STAT. ANN. § 403.035 (1) (1962); OKLA. STAT. ANN. tit. 12, § 1272 (1961); NEB. REV. STAT. § 42-303 (1960); VA. CODE ANN. § 20-97 (1960), discussed in 44 VA.

gone so far as to enact a statute of general application which bases divorce jurisdiction upon three-months' residence.[10] There are other variations from the domicile requirement.[11]

Alaska's attempt to provide a divorce forum for military personnel stationed within the state raises two constitutional questions: First, are decrees awarded under a statute which substitutes residence for domicile as the jurisdictional standard in divorce actions entitled to full faith and credit recognition in other jurisdictions? Second, does a statute which dispenses with the requirement of domicile violate due process of law?[12]

The United States Supreme Court has never expressly ruled that domicile is a constitutional requirement which must be met before full faith and credit need be given to a divorce decree granted by another state. The Court has, however, stated that "courts of one state are ... without jurisdiction to dissolve the marriages of those domiciled in other states."[13] In *Williams v. North Carolina* (*Williams* (II)),[14] the

L. REV. 1192 (1958). One state court interpreted a similar statute, N.C. GEN. STAT. § 50-18 (Supp. 1963), as not having changed the domicile requirement. Martin v. Martin, 253 N.C. 704, 118 S.E.2d 29 (1961). The case is criticized in 40 N.C. L. REV. 343 (1962). Another court has declared a similar statute unconstitutional insofar as it conflicts with the venue requirements of the state constitution. GA. CODE ANN. § 30-107 (Supp. 1963), Darbie v. Darbie, 195 Ga. 769, 25 S.E.2d 685 (1943). Some states have expressed their concern for their domiciliaries in the armed forces who are stationed in other states by providing special divorce forums. CONN. GEN. STAT. § 46-15 (1958); IND. ANN. STAT. § 3-1203 (Supp. 1964); VT. STAT. tit. 15, § 592 (1958); R.I. LAWS ANN. § 15-5-12 (1956).

[10] ARK. REV. STAT. ANN. § 34-1208.1 (1962). This statute was held to be constitutional in Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958). For a discussion of the Arkansas statute by another court in which the statute was not at issue, see Commiskey v. Commiskey, 362 Minn. 676, 107 N.W.2d 864, 869 (1961).

[11] See COLO. REV. STAT. ANN. § 46-1-3 (1963) (domicile not required if adultery or extreme cruelty is alleged); LA. CIVIL CODE ANN. 139, 142 (Supp. 1964), *but see* LA. C.C.P. 10 (7) (1960), and Thomas v. Thomas, 144 So.2d 612 (La. App. 4th Cir. 1962), discussed in 23 LA. L. REV. 600 (1962); ME. REV. STAT. ch. 166 § 55 (1959), Walker v. Walker, 111 Me. 404, 89 Atl. 373, 374 (1914); Mo. REV. STAT., § 452.050 (1952) (domicile not required where the offense or injury was committed within the state), Madsen v. Madsen, 193 S.W.2d 507 (Mo. 1946), discussed in 24 Mo. L. REV. 218 (1959); MINN. STAT. § 518.07 (1947) (domicile not required if adultery is alleged); N.Y. CIVIL PRACTICE ACT § 1147-52 (1944) (divorce jurisdiction based solely upon the fact of marriage within the state, regardless of present domicile), David Zieseness v. Zieseness, 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954); N.J. STAT. ANN. § 2A: 34-10 (1) (1952) (domicile not required if adultery is alleged), *but see,* Matias v. Matias, 70 N.J. Super. 111, 175 A.2d 259 (1961).

[12] A full exposition of the due process question is beyond the scope of this note, and the discussion which follows is intended only to be suggestive of problems encountered in the area.

[13] Durfee v. Duke, 375 U.S. 106, 115 (1963) (dictum). The *Durfee* case was not a divorce case. Rather, it involved an extension of the principle of res judicata to jurisdictional disputes over real property. The Supreme Court relied primarily on Sherrer v. Sherrer, 334 U.S. 343 (1948) and Davis v. Davis, 305 U.S. 32 (1938), both of which involved an application of res judicata principles to foreign divorce decrees. Mr. Justice Stewart does not disclose what is meant by "dissolve." If "dissolve" includes annulments as well as divorces, a majority of states presently, by statute or judicial precedent, violate the domicile jurisdictional requirement by granting annulments in some

Supreme Court established the rule that a divorce decree is subject to collateral attack if it is based on an erroneous finding of domicile. In cases following *Williams* (II), collateral attack on the issue of domicile has been narrowed, and is now limited to ex parte divorce decrees.

In *Sherrer v. Sherrer*,[15] the Supreme Court held that where both parties to a divorce decree had participated[16] in the proceedings and had an opportunity to fully and fairly litigate the domicile issue, the divorce could not be collaterally attacked by the participants in the courts of another state. This rule has since been extended to preclude collateral attack by third parties[17] and to raise a presumption of participation.[18] In the *Sherrer* line of cases a state court had refused to give full faith and credit to a divorce decree granted in another state after finding that neither of the parties to the divorce were domiciled in the decree-granting state. The Supreme Court reversed these decisions, holding that the first state's determination of domicile was res judicata and that full faith and credit recognition of the divorce decree was mandatory. The effect of applying res judicata to extra-territorial divorce decrees has been to empower participating parties to a divorce to confer jurisdiction by consent, and to make actual proof of domicile necessary only when an ex parte divorce decree has been collaterally attacked.[19]

A participating divorce decree granted under the Alaska statute would present a fact situation very similar to those found in the *Sherrer* line of cases.[20] In both situations, the decree-granting state is not the state of technical domicile, but, because the parties have participated in the proceedings, the requirements of procedural due process would seem satisfied[21] and full faith and credit recognition should be required.

---

circumstances to non-domiciliaries. See Vernon, *Labyrinthe Ways: Jurisdiction To Annul*, 10 J. PUB. L. 47 (1961). Statements of a similar nature have been made in Sherrer v. Sherrer, 334 U.S. 343, 349 (1948); Williams v. North Carolina (II), 325 U.S. 226, 229 (1945); Williams v. North Carolina (I), 317, U.S. 287, 297 (1942); Andrews v. Andrews, 188 U.S. 15, 41-42 (1903); Bell v. Bell, 181 U.S. 175, 178 (1901).

[14] 325 U.S. 226 (1945).

[15] 334 U.S. 343 (1948); *accord*, Coe v. Coe 334 U.S. 378 (1948).

[16] For cases defining the degree of "participation" necessary, see EHRENZWEIG, *op. cit. supra* note 4, § 74 (1962).

[17] Johnson v. Muelberger, 340 U.S. 581 (1951) (daughter).

[18] Cook v. Cook, 342 U.S. 126 (1951).

[19] EHRENZWEIG, *op. cit. supra* note 4, at 242.

[20] In Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954), and Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958), the New Mexico Supreme Court, relying on the *Sherrer* line of cases, upheld divorces granted under a statute very similar to Alaska's.

[21] In Durfee v. Duke, 375 U.S. 106 (1963), the Supreme Court reviewed *Sherrer* and other cases involving the application of res judicata to cases in which there is a jurisdictional dispute. The court did not mention due process. Apparently once the controversy has been "fully and fairly" litigated the requirements of due process are satisfied.

Williams (II) seems to control cases involving ex parte decrees rendered under the Alaska statute to servicemen technically domiciled in other states. In such cases, a second state would not be precluded by the *Sherrer* doctrine of res judicata from relitigating the jurisdictional issue and denying full faith and credit recognition. In *Williams* (II), an ex parte divorce decree had been granted under a Nevada statute which required domicile.[22] The Supreme Court held that North Carolina could deny full faith and credit to the Nevada divorce decree if the North Carolina court, after placing the burden of proof on the challenging party, found the Nevada court's determination of domicile to be erroneous. The *Williams* (II) decision does not make clear whether full faith and credit was denied because domicile is a constitutional requirement for jurisdiction to divorce, or because the Nevada divorce statute requiring domicile for jurisdiction to divorce was not fulfilled.[23] If domicile is a constitutional requirement for divorce jurisdiction, as Mr. Justice Stewart has indicated in *Durfee v. Duke*,[24] any ex parte decree rendered under the Alaska statute to a serviceman technically domiciled in another state would be void and not entitled to full faith and credit. If, on the other hand, full faith and credit was denied because Nevada's divorce statute requiring domicile was not fulfilled, then it appears that ex parte decrees granted under the Alaska statute should be entitled to full faith and credit, because the Alaska statute does not require domicile. Absent a definitive Supreme Court holding, it is not certain whether full faith and credit must be given to ex parte divorce decrees granted under the Alaska statute. It does seem, however, that if the Alaska legislature had defined domicile as "residence within the state for one year" and incorporated this definition into the divorce statutes, collateral attack on ex parte decrees by other state courts might be precluded and the precedential force of *Williams* (II) considerably curtailed.

In *Alton v. Alton*[25] the Third Circuit held that a Virgin Islands statute which required only six weeks' residence for divorce jurisdiction contravened the due process clause of the Fourteenth Amendment. Judge Goodrich, writing for the majority, reasoned that since the Su-

[22] NEV. REV. STAT. § 125.020 (1957).

[23] For an exhaustive discussion of the divergent views expressed in the opinion see Powell, *And Repent at Leisure: An Inquiry Into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder*, 58 HARV. L. REV. 930 (1945).

[24] 375 U.S. 106, 115 (1963) (dictum).

[25] 207 F.2d 667 (3rd Cir. 1953), *cert. granted*, 347 U.S. 911 (1954), *dismissed as moot*, 347 U.S. 610 (1954). See 67 HARV. L. REV. 516 (1954).

preme Court has denied full faith and credit recognition where divorce jurisdiction was not based upon a finding of domicile,[26] it must be because the initial rendering of such decrees violates due process. There is little authority for this conclusion, and it seems to be a unique and strained application of the due process clause.[27] Full faith and credit is usually denied on jurisdictional grounds for the purpose of protecting state and public interests in the marital status of the domiciliary state's citizens, or assuring that one state does not attempt to extend its jurisdiction so far as to infringe upon the sovereignty of other states. The jurisdictional demands of due process, on the other hand, are designed to assure procedural fairness in determination of the rights of the parties to the action. In *Alton,* the domiciliary state was not a party to the divorce proceedings. Any failure to consider its interests should not have been objectionable on due process grounds. Because the defendant in *Alton* consented to the court's jurisdiction by entering a general appearance, none of his rights protected by the due process clause appear to have been infringed or impaired.[28] Where both parties have consented to the court's jurisdiction and actively litigated the issues of the divorce due process would seem to be satisfied. The Supreme Court declined to rule on the due process question in *Alton.*[29] Only one state court has held that a statute which fails to base jurisdiction on domicile is unconstitutional.[30] Many authorities have been critical of the Third Circuit's analysis,[31] and a number of state courts have expressly rejected it.[32]

---

[26] Williams v. North Carolina, 325 U.S. 226 (1945).

[27] See Alton v. Alton, 207 F.2d 667, 684 (3rd Cir. 1953) (dissenting opinion); Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127, 134 (1954) (concurring opinion); Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory,* 42 A.B.A.J. 222, 224-25 (1956); Rheinstein, *supra* note 4, at 779. *But see* Stumberg, *Jurisdiction to Divorce,* 24 TEX. L. REV. 119, 123-24 (1946).

[28] When the Virgin Islands statute reached the Supreme Court in a subsequent case Mr. Justice Clark stated: "[N]either of the Granville-Smiths claim that they have been deprived of life, liberty, or property without due process of law. While the state has an interest in the marital relationship, certainly this interest does not come within the protection of the Due Process clause." Granville-Smith v. Granville-Smith, 349 U.S. 1, 26-27 (1955) (dissenting opinion). The court avoided the due process question and held the statute invalid on the ground that the territorial legislature had exceeded the power granted it by Congress in enacting the statute.

[29] Certiorari was granted in the *Alton* case but it was later dismissed as moot since one of the parties obtained a divorce in another state. See note 25 *supra.*

[30] Jennings v. Jennings, 251 Ala. 73, 36 So.2d 236 (1948), held invalid a statute permitting non-resident couples to confer jurisdiction by consent and thus obtain an Alabama divorce. The same court, however, in Conrad v. Conrad, 275 Ala. 202, 153 So.2d 635 (1963), held that an Alabama statute ALA. CODE tit. 7, § 96 (1) (1960), was valid even though it extended divorce jurisdiction to military personnel without a finding of domicile and, in the *Conrad* case, without meeting the prescribed one year residence requirement.

[31] See authorities cited note 27 *supra.*

[32] See cases cited notes 9 and 10 *supra.*

Policy considerations suggest that divorce decrees granted under the Alaska statute should be accorded full faith and credit, and that domicile should not be held the sole jurisdictional basis for divorce. Alaska's statute, unlike the Virgin Islands' statute in the *Alton* case and the statutes in the "divorce mill" states,[33] is not a commercially motivated attempt to institutionalize "tourist divorces." The Alaska statute requires a minimum of at least one year's residence within the state, compared with as little as six weeks in some jurisdictions. The purpose of the Alaska statute is not to infringe upon any interests which a domiciliary state might have in a serviceman's marital status; its purpose is to provide a convenient forum in which servicemen stationed in Alaska may seek divorces. The statute operates to correct a technical deficiency in the domicile rule which denies access to local divorce forums to a limited group of persons whose need for such judicial process is as great as that of any other group.

It seems unlikely that Alaska's exercise of divorce jurisdiction over military personnel will in any way impair the marital stability of a domiciliary state's society or the sanctions and policies behind its marriage laws. Changing views about the social utility of divorce and pressures generated by increased mobility of our population have negated a great deal of the persuasiveness of the state interest argument. A state's interest in the marital status of its domiciliaries who are in the armed forces and stationed in other states is primarily an economic interest. No state desires to bear the burden of supporting the families of servicemen who are granted ex parte divorces which fail to provide for adequate alimony and child support. However, this justification for denial of full faith and credit assumes that Alaska will grant divorce decrees to military personnel improvidently. The assumption does not seem warranted. At any event, under the "divisible divorce" doctrine an ex parte divorce decree does not effectively terminate the other spouse's support rights.[34]

Furthermore, the domiciliary state's interest in the marital status of

[33] ARK. STAT. ANN. § 34-1208 (1947) (three months residence); IDAHO CODE § 32-701 (1963) (six weeks residence); NEV. REV. STAT. § 125.020 (1963) (six weeks residence); WYO. REV. STAT. § 20-48 (1959) (sixty days residence).

[34] The Supreme Court has held that an ex parte migratory divorce decree cannot affect the defendant spouse's right to support where that right has been previously established by judicial decision. Estin v. Estin, 334 U.S. 541 (1948). There are indications that even where the right to support is sought subsequent to the divorce it is not affected by the divorce decree. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); for state cases see EHRENZWEIG, *op. cit. supra* note 4, §§ 80, 81 (1962). In either case, the law of the defendant spouse's state must provide for survival of the support right after the decree is granted. See Comment, 76 HARV. L. REV. 1233 (1963).

military personnel who are stationed in Alaska for one year may be no greater than, and usually is much less than, Alaska's interest. Divorce jurisdiction conferred by the Alaska statute is based upon the substantial contacts with the state which a serviceman residing within Alaska for one year will have established. In many cases the circumstances which led to a divorce will have occurred or culminated in Alaska. It seems unreasonable that military personnel should be denied a local divorce forum in a state in which they have been stationed for at least one year, while it is possible to gain a valid divorce decree in some states after six weeks' residence and a pretense of establishing domicile.[35]

In conclusion, divorce decrees granted under the Alaska statute should be entitled to full faith and credit in all jurisdictions if both parties have participated in the Alaska proceedings. The status of ex parte divorces is not so certain, but if domicile is not a constitutional prerequisite for divorce, an ex parte decree under the Alaska statute should be given full effect in other states. The domicile requirement, insofar as it applies to military personnel, represents what Mr. Justice Cardozo has termed the "tendency of a principle to expand itself to the limit of its logic";[36] it is hoped that this principle has also reached the limits of its history and that it will not be applied to defeat the desirable social policy embodied in the Alaska statute.

[35] Justice Clark, in reference to the Virgin Islands' statute which attempted to eliminate domicile as a jurisdictional requirement, said that such a statute's "only vice . . . is that it makes unnecessary a choice between bigamy and perjury." Granville-Smith v. Granville-Smith, 349 U.S. 1, 28 (1955) (dissenting opinion).

[36] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1928).